

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Communications, Energy, and Public Utilities Committee

BILL: SB 1034

INTRODUCER: Senator Fasano

SUBJECT: The Public Service Commission

DATE: February 1, 2010

REVISED: 02/02/10

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Caldwell	Caldwell	CU	Fav/1 amendment
2.		RC	
3.			
4.			
5.			
6.			

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input checked="" type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill expands the ex parte communications provision to apply to commission staff and expands the types of communications that would be considered ex parte communications. The bill requires notice to the public of any oral or written communication between a commissioner or commission staff and a regulated utility representative. The bill also requires the commission to notify Public Counsel of all communications it receives, with the exception of certain communications related to audits, and prescribed procedures for such notice. The bill expands the exemption from ex parte communications to individual ratepayers from individual residential ratepayers.

The bill expands the provision prohibiting certain employment of former commissioners and employees after termination to prohibit for 2 years former commissioners and employees from lobbying the legislature or executive branch of state government. The bill expands to a commission staff member a 2 year prohibition from accepting employment from regulated companies or companies with certain nexus thereto.

The bill includes Public Counsel in the provisions providing for access to company records and confidential information for telecommunications companies, electric utilities, water and wastewater utilities, and natural gas transmission companies.

The bill provides an effective date of July 1, 2010.

This bill substantially amends sections 350.042, 350.0605, 364.183, 366.093, 367.156, and 368.108 of the Florida Statutes.

II. Present Situation:

Section 350.042, F. S., provides for ex parte communications. The term “ex parte” is not defined in the statute but according to *Black’s Law Dictionary* means “on one side only, by or for one party, done for, in behalf of, or on the application of, one party only.” According to the *American Heritage Dictionary*, the term means “from or on one side only; one sided, partisan.” Subsection (1) provides that a commissioner should accord to every person who is legally interested in a proceeding full right to be heard according to law, and except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54, F. S., (rulemaking) or 120.565, F.S., (declaratory statements by agencies), workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The subsection does not apply to commission staff.

Individual residential ratepayers are allowed to communicate with a commissioner, provided that the ratepayer is representing only himself or herself, without compensation. In addition, the section does not apply to oral communications or discussions in scheduled and noticed open public meetings of educational programs of a conference or other meeting of an association of regulatory agencies.

Subsection (4) provides that if a commissioner knowingly receives an ex parte communication relative to certain proceedings, the commissioner must place on the record of the proceedings copies of all written communications made and received, a memorandum stating the substance of all oral communications made and received and shall give written notice to all parties. Any party may respond to the ex parte communication within 10 days after receiving the notice. Finally, the commissioner may withdraw from the proceeding, if he or she deems it necessary to eliminate the effect of an ex parte communication received.

Subsection (5) prescribes actions individuals who make ex parte communications must take. Subsection (6) provides that any commissioner who knowingly fails to place on the record any such communications within 15 days of the date of such communications is in violation of the section and is subject to removal and may be assessed a civil penalty not to exceed \$5,000.

Subsection (7) requires the Commission on Ethics to receive and investigate sworn complaints of violations. If the Ethics Commission finds a violation by a public service commissioner, it shall provide the Governor and the PSC Nominating Council with a report of its findings and recommendations. The Governor is authorized to enforce the findings and recommendations under part III of chapter 112. The Ethics Commission may enforce an unpaid assessed penalty in

circuit court. If, during an investigation by the Ethics Commission into an alleged violation, allegations are made as to the identity of the person who participated in the ex parte communications, that person must be given notice and an opportunity to participate in the investigation and relevant proceedings to present a defense. If that person is determined to have participated in the ex parte communication, the person may not appear before the PSC or otherwise represent anyone before the commission for a period of 2 years.

In addition to the statute, the PSC adopted in 1993 rule 25-22.033, F.A.C., relating to communications between commission employees and parties. In the rule, the commission recognizes that its employees must exchange information with parties who have an interest in its proceedings. It also recognizes that all parties to adjudicatory proceedings need to be notified and given an opportunity to participate in certain communications. The rule is not intended to prevent or hinder the exchange of information, but to provide all parties to adjudicatory proceedings notification of and the opportunity to participate in certain communications.

Subsection (1) of the rule states that the rule governs communications between employees and parties to docketed proceedings before the commission. The rule does not apply in rulemaking, declaratory statements by agency, staff assistance in changing rates and charges, interim rates, proposed agency action proceedings before the commission has voted to issue a PAA order, non-rate case tariffs, workshops, or internal affairs meetings. The rule also exempts docketed and undocketed audits, telephone service evaluations, and electric and gas safety inspections. The rule is not intended to modify or supersede the procedural requirements for formal discovery under commission rules or the Florida Rules of Civil Procedure, or affect communications regarding discovery request, procedure, or other matters not concerned with the merits of the case.

Subsection (2) of the rule states that notice of any written communication between commission employees and parties shall be transmitted to all other parties at the same time as the written communication, whether by U.S. Mail or other means. Subsection (3) provides that all parties to the proceeding shall be given reasonable notice of the time and place of any scheduled meeting or conference call¹ between employees and parties. Subsection (4) allows any party to a proceeding to prepare a written response to any communication between a commission employee and another party. Notice of any such response shall be transmitted to all parties.

Finally, subsection (5) provides that no commission employee shall directly or indirectly relay to a commissioner any communication from a party or an interested person which would otherwise be a prohibited ex parte communication. However, non-testifying advisory staff members may discuss the merits of a pending case with a commissioner, provided the communication is not otherwise prohibited by law. Staff members who testify in a case are prohibited from discussing the merits of that case with any commissioner during the pendency of that case.

Section 350.0605, F.S., relates to former commissioners and employees and representation of clients before the commission. Subsection (1) prohibits any former commissioner from appearing before the commission representing any client or any industry regulated by the commission for a period of 2 years following termination of service. Subsection (2) prohibits any former

¹ A conference call is defined as a telephone call involving three or more persons.

employees from appearing before the commission representing any client regulated by the commission on any matter which was pending at the time of termination and in which such former employee had participated. Subsection (3) provides that for a period of 2 years following termination of service, a former member may not accept employment by or compensation from a business entity which, directly or indirectly, owns or controls a public utility regulated by the commission, from a public utility regulated by the commission, from a business entity which, directly or indirectly, is an affiliate or subsidiary of a public utility regulated by the commission or is an actual business competitor of a local exchange company or public utility regulated by the commission and is otherwise exempt from regulation by the commission under ss. 364.02(14) (wholesale telecommunications companies, mobile service providers, fax service providers, private data network providers, cable companies, and intrastate long distance telecommunications providers) and 366.02(1), (public utilities) F.S., or from a business entity or trade association that has been a party to a commission proceeding within the 2 years preceding the member's termination of service on the commission.

Sections 364.183, 366.093, 367.156, 368.108, F.S., authorize commission access to company records of telecommunications companies, public electric utility companies and their affiliates, public water and wastewater utility companies, and natural gas transmission companies. In addition, these sections provide for an exemption from public record under s. 119.07(1), F. S. of any documents found to be proprietary confidential business information. According to the Public Counsel, his office has access to all documents whether they are public record or proprietary confidential business information. Commission Rule 25-22.006, F.A.C., provides for confidential information. The rule defines terms and sets forth procedures for making determinations and for treatment of confidential proprietary business information.

III. Effect of Proposed Changes:

Section 1 includes commission staff in the prohibition on ex parte communications. It also deletes the limitation that a communication must concern "the merits, threat, or offer of reward in any proceeding" to be considered ex parte, thereby prohibiting any communication relating to any proceeding.

A new subsection (2) is added to the section to provide any oral or written communication between a commissioner or commission staff and a representative of a utility regulated by the commission must be made available to the public. The public counsel is to be given advanced notification. The commission is required to send a copy of any written communication to the Public Counsel on the same day it was received. The commission is required to prepare a written summary of any communications related to a documented emergency or communications related to a brief, unscheduled follow-up from a scheduled meeting or phone conversation. The commission is required to provide such summary to the Public Counsel within 10 days of the communication. The Public Counsel is required to be notified by commissioners or staff at least 5 working days before any meeting, telephone conference call, or written communication between a commissioner or commission staff and a representative of a regulated utility. The Public Counsel may participate in the meeting, telephone call, or written communication for the purpose of questioning or directly responding to the communication. Commission staff or representatives of a regulated utility who are required to initiate or receive brief, unscheduled

communications for the purpose of obtaining additional information that may be needed after the completion of an audit are exempt.

Changes to subsections (3) through (8) conform the remaining provisions of the section to include the term “commission staff.”

Section 2 of the bill amends s. 350.0605, F.S., relating to former commissioners and employees representation of clients before the commission. The bill prohibits any former commissioner from lobbying the legislative or executive branch of state government for a period of 2 years following termination of service with the commission. This provision applies to commissioners prospectively (after July 1, 2010 appointments). The bill further prohibits any former employees from appearing before the commission representing any client or industry regulated by the commission or from lobbying the legislative or executive branch of state government for a period of 2 years following termination of employment. This provision applies to employees who terminate their employment on or after July 1, 2010. The bill removes the prohibition that former employees cannot appear before the commission representing any client regulated by the commission on any matter which was pending at the time of termination and in which the former employee participated.

A new subsection (3) is added and the current subsection (3) is deleted. The difference is that the new provision adds commission staff to the provision and applies the subsection to commissioners and commission staff members who terminate their employment with the commission on or after July 1, 2010, instead of when the commissioners are appointed or reappointed.

Sections 3, 4, 5, and 6 amend ss. 364.183, 366.093, 367.156, and 368.108, F.S., to provide the Public Counsel with the same access to records currently afforded to the commission for telecommunication or affiliated companies, public utility or affiliated companies, water and wastewater utilities or affiliated companies, and natural gas transmission or affiliated companies, respectively. The bill also provides that the Public Counsel may determine that such records constitute proprietary confidential business information and are exempt from the provisions of s. 119.07(1), F.S. (public records). Current law provides that only the commission can make such determination. According to the Public Counsel, the office already has access to company records, both public and confidential, and does not believe there is need to make such determinations required by the bill.

Other Potential Implications:

The bill would prohibit all communications in any proceeding as ex parte, not just those concerning “the merits, threat, or offer of reward.” This may prohibit mundane communications such as those relating to filing or scheduling.

It appears that the goal of new s. 350.042(2), F.S., is to set forth how communications in a subject proceeding may be accomplished without being ex parte. The problem is that the section seems to assume that all proceedings have only three parties: the PSC, a utility, and the OPC. The new provisions should be made to include other parties or the communication is still ex

parte. Moreover, the prohibition in new s. 350.042(2), F.S., does not appear to apply to telecommunications companies, which are not defined as “utilities” in the statutes.

The change to subsection 350.042(3), F.S., appears to now allow large individual users, possibly even industrial and commercial parties to proceedings, ex parte communications with commissioners and commission staff.

The inclusion of PSC staff members in the provisions on investigation of and discipline for ex parte communications appears to remove all authority of the commission over its employees regarding these alleged violations.

The restrictions on past employment for commissioners apply only to those appointed after the effective date of the bill while those restrictions for employees apply without regard to the date of hire. According to the commission, the prohibition on a former commissioner or employee from lobbying the legislative or executive branch of state government may preclude an individual from lobbying on his or her own behalf on issues of personal interest or welfare, and could potentially create a First Amendment concern.

Paragraph (b) appears to prohibit lobbying any “state government,” possibly overly restricting former commissioners and employees from moving out of Florida to find employment. In addition according to the commission, the bill does not appear to allow former commissioners or employees who are appointed or reappointed or terminated (respectively) on or after July 1, 2010, to represent any entity before the Legislature, whether or not the commission regulates the represented entity. This provision may create unreasonable government interference to government employment and raise Fifth Amendment concerns.

The existing restrictions on past employment of state elected officials, appointed officials, and employees contained in ss. 112.313 and 350.0605, F.S. are less restrictive than those proposed in the bill. They apply only to the agency of previous employment and only to senior management or select exempt employees or to those matters in which the employee participated. The bill prohibits any representation before the PSC for two years but also prohibits lobbying either the legislature or executive branch. The connection between PSC employment and lobbying an entity with which the employee most likely had no employment contact is unclear, as is the purpose of the prohibition.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Public Counsel is required to make findings of confidentiality for certain records obtained which may constitute the creation of a new public records exemption.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Other parties to certain proceedings do not get the same notice of communications as Public Counsel which may put them at a disadvantage in the proceeding.

C. Government Sector Impact:

The notice requirement to Public Counsel may create more workload on both the commission and Office of Public Counsel. It is unknown whether either would need additional staff.

VI. Technical Deficiencies:

The bill appears to have some inconsistencies in terms. For instance, the terms “former employee” is used on line 168 while the term “former commission staff member” is used on lines 183, 195, and 197. The distinction is unclear.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:**Barcode 237068 by Communications, Energy, and Public Utilities on February 2, 2010:**

The delete all amendment narrows the ex parte and post employment provisions of the bill and removes the sections relating to access to records and confidentially to retain current law.

Specifically section 1 as amended applies the ex parte restrictions to commissioner advisory staff and defines the term to mean commissioners’ assistants and executive secretaries. This amendment expanded the prohibition of discussion of the merits of any issue that the individual knows will be filed with the commission, removing the time

frame of within 90 days after the date of the discussion. The amendment also changes the notice of oral or written communication between a commissioner or commission staff to apply to a commissioner or commissioner's advisory staff and that such oral or written communication must be posted on the commission's website within 72 hours after the communication occurs rather than provided to Public Counsel. Written summaries of certain communications must be posted on the commission's website within 72 hours rather than to the Public Counsel within 10 working days. Seventy-two hour advance notice of certain communications must be posted on the commission's website rather than provided to Public Counsel 5 days prior to any such communication.

Section 2 is amended to limit the application on prohibition of certain employment after termination of service. The amendment applies the limitation to commissioner's advisory staff that are hired with the commission on or after July 1, 2010, instead of all commission staff that are terminated on or after July 1, 2010.

The amendment omits sections 3 through 6 related to access to public records and confidentiality leaving those sections as current law.

WITH TITLE AMENDMENT